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IN THE

Supreme Court of the United States

October Term, 1973
No. 73-1203

HAWAIIAN AIRLINES, INC.,

Petitioner,

vs.

HONORABLE SAMUEL P. KING, Judge of the United States District Court for the District of Hawaii,

Respondent,

and

ALOHA AIRLINES, INC.,

Real Party in Interest.

Aloha Airlines, Inc., Brief in Opposition to Petition for Writ of Certiorari.

I.

Statement of the Case.

The case below was initiated by plaintiff, Aloha Airlines, Inc. (AAL), against defendant-petitioner, Hawaiian Airlines, Inc. (HAL), under Section 4 of the Clayton Act (15 U.S.C. 15). AAL charged that HAL, by a series of predatory acts, sought to eliminate it as a competitor and thus secure for itself all of the interisland air transportation in the State of Hawaii in violation of Section 2 of the Sherman Act (15 U.S.C. 2). HAL filed a "shotgun" counterclaim which charges, *inter alia,* that (1) AAL violated Section 2 of the

Sherman Act (15 U.S.C. 2), (2) that AAL had engaged in unfair competition interdicted by Section 480-2 of the Hawaii Revised Statutes, and (3) that AAL had, by illegal rebates, induced certain travel agents to deal with it exclusively in violation of Section 1 of the Sherman Act (15 U.S.C. 1).

In the ordinary course of discovery, HAL sought, without opposition, AAL documents evidencing its dealings with travel agents. When, however, AAL twice sought to secure documents from HAL evidencing its relationships with travel agents, HAL resisted. The present Petition for Certiorari arises out of a ruling by the District Judge made from the bench on December 7, 1973 granting Aloha's Motion to Compel Production, under Rule 37, Federal Rules of Civil Procedure, of those documents evidencing HAL's relationships with travel agents. That ruling was memorialized on November 19, 1973. On February 12, 1974, the Court of Appeals for the Ninth Circuit denied HAL petition for mandamus.

ARGUMENT.

Rarely in the defense of antitrust litigation, even by the institutionalized law firms whose clients can better afford such dilatory maneuvers than this particular defendant, have we encountered so vehement an effort to thwart discovery. Paying lip service to the proposition that "the federal rules encourage broad and liberal discovery" (Petition, p. 6), HAL goes on to contend that it should be permitted to discover and presumably offer in evidence AAL's alleged wrongful conduct vis-a-vis travel agents in a complete and total vacuum so that the jury and/or Judge do not understand, appreciate or even know that in truth, AAL's alleged illegal conduct was purely defensive and that AAL, far from seeking to monopolize, was struggling for survival and wholly lacking any predatory or exclusionary intent.

HAL, by its spurious attempt to "create" a legal issue on the interpretation of this Court's decisions in *Kiefer-Stewart v. Joseph Seagram and Sons,* 340 U.S. 211 (1941) and *Perma-Life Mufflers, Inc. v. International Parts Corporation,* 392 U.S. 134 (1968), reveals the frivolity of this Petition. In alleging that AAL has attempted to monopolize, has engaged in unfair methods of competition and violated Section 1 of the Sherman Act by entering into exclusive dealing contracts, HAL has failed to allege *any* conduct which *per se* offends Sections 1 or 2 of the Sherman Act. Indeed, in any claim of attempt to monopolize, intent is *the* critical element. In any case of unfair competition, intent and total market facts are essential ingredients, and, in judging the legality of exclusive dealing contracts under Section 1 of the Sherman Act this Court held in *Tampa Electric Company v. Nashville Coal*

Company [365 U.S. 320 (1961)] that such contracts Court of Appeals for the Ninth Circuit denied HAL's "may well be . . . in the context of antitrust legislation . . . suspect, *but they have not been illegal per se* . . ." (365 U.S. at 333).

It is perfectly clear that *pari delicto* was *not* asserted here as a defense. AAL did not below and does not now assert that HAL is precluded from its lawsuit because it violated the antitrust laws. What AAL contended successfully below—and will prove without difficulty if discovery is accorded—is that its conduct was not intended to restrict competition but was defensive. Thus we do not quarrel with or evade *Perma-Life, supra,* to suggest that in defending on these charges—no one of which is a *per se* violation of the Sherman Act and each of which involves intent and market analysis—we are entitled to show the market facts and the industry environment. The District Court found *Union Leader Corp. v. Newspapers of New England, Inc.,* 284 F.2d 582, 586-587 (1st Cir. 1960); and *Florists' Nationwide Tel. Del. Net. v. Florists' Tel. Del. Ass'n.,* 371 F.2d 263, 267 (7th Cir. 1967), dispositive and these cases do not impair or conflict with *Perma-Life, supra.*

Conclusion.

There is no doubt whatever, particularly considering the broad and liberal use of discovery rules, that AAL is entitled to documents evidencing HAL's bribes and payoffs in order to defend itself on the merits against HAL's counterclaims. No issue affecting antitrust enforcement is involved. Instead extraordinary relief is sought against a wholly appropriate discovery order requiring HAL to disgorge itself of facts necessary to

permit defense against a serious counterclaim which it has filed. If HAL is unwilling to disgorge itself of this information its alternative is simple—it may withdraw its intimidatory counterclaim. But this Court need not be burdened with review of a routine order—already approved via denial of mandamus by the Ninth Circuit. HAL's petition is presumptuous. The Writ of Certiorari should be denied.

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